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IN THE

Supreme Court of the United States

October Term 1966

No. 262

MICHAEL KUBERSKI,

Petitioner,

—*vs.*—

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The District Court rendered no opinion in this matter. The proceedings on Respondent's motion for a judgment n.o.v. or a new trial are set forth in the Appendix at pages 320a-335a. The opinion of the Court of Appeals for the Second Circuit, printed in Appendix A of the Petition is reported in 359 F 2d 90.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED.

Should certiorari be granted merely to review evidence and evaluate specific facts?

STATUTES INVOLVED.

Title 45 U.S.C. Section 51

The pertinent provisions of the Federal Employers Liability Act are set forth in the Petition at pages 2 and 3.
Title 28 U.S.C. Section 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF FACTS.

The proof in this case shows that Petitioner is alleging an accidental injury to his left knee which injury is alleged to have occurred on August 25, 1960 during the course of Petitioner's employment, as a car inspector at the Dewitt, New York yard of the Respondent.

Petitioner, an employee of the Respondent for 22 years, reported to work at 11:00 P.M. on August 24, 1960. At that time the "Buffalo Extra" was being readied as a train and the railroad cars making up this train were located on Tracks 1 and 3. The tracks of the Respondent run in a

generally easterly-westerly direction and are numbered consecutively from south to north. Petitioner commenced his inspection of the cars on Track 1 from the east walking westerly along the south side of the cars. His partner, Mr. Barth, deceased at the time of the trial, was inspecting the north side of the same cars. Two other car inspectors, Mr. Duda and Mr. Brown, were inspecting the most westerly cars on Track 1, walking in a generally easterly direction.

After having inspected 12 to 14 cars Petitioner, in response to a call from Mr. Barth, started to cross from the south side to the north side of the cars. In so doing he placed his left foot on the operating lever, pushed himself up with his right foot, placed his right foot on the coupler and then something happened and Petitioner just fell and found himself on the north side of the cars.

There was nothing wrong with the operating lever or the coupler and although the area was unlighted Petitioner was supplied with a hand lantern which he used.

The evidence shows that the Respondent had a motor car or scooter in the yard on the date of the accident upon which were the heavy tools necessary to close doors on boxcars and make other minor repairs. These tools could not be carried by the car inspectors, but in addition to being on the motor car the tools were available at the car inspectors' shanty. While it was good railroad practice to have a motor car available the normal and usual procedure of the car inspectors upon discovery of a defective door was to put a cripple tag on the side of the boxcar and when the motor car comes up the people on the motor car try to repair the door.

The purpose of the motor car is to make repairs and it can be shuttled over various tracks and make repairs that can't be accomplished by car inspectors who have walked the train making the mechanical inspection.

While foreman, Kimber, did not remember whether or not he had ordered the motor car to accompany the men inspecting the "Buffalo Extra" and he did not know the exact location of the motor car at the time of the accident the proof is that immediately after the accident the Petitioner requested Mr. Barth to walk west, meet the other car inspectors and tell them to get the motor scooter. Subsequently and about ten minutes after the accident the motor car arrived from the west and on Track 2.

ARGUMENT.

I. There is no conflict of opinion or important question of law to be resolved.

The Petitioner states that the question presented for review is "Was there sufficient evidence of negligence to sustain Petitioner's jury verdict in the District Court?" It is obvious from this question that petitioner does not claim that there is any particular gravity and general importance to this case, other than to the litigants, nor does the Petitioner claim that the writ is being requested in order to secure uniformity of decision.

The petition for a writ of certiorari in this case is merely a request for a review of the evidence and a further discussion of specific facts. A request to review evidence and to discuss specific facts is contrary to the law as to when and for what purpose the writ of certiorari should be granted.

Hamilton Shoe Co. vs. *Wolf Brothers,* 240 U. S. 251

Magnum v. *Coty,* 262 U. S. 159

There can be no question but that the functions of the Court and the jury in cases arising under the Federal Employers' Liability Act have been clearly defined. The opin-

ion below shows that there is no conflict between the decision of the Court of Appeals and that of any other court of appeals and that there is no novel question of law to be resolved. The law was carefully reviewed by the Court, including the most recent opinions of this Court and judgment found in favor of the defendant upon the application of the law as enunciated by this Court to the facts herein.

Since the law is not in dispute and the Court of Appeals followed the rules of law as set forth by this Court and applied that law to the facts herein, all that petitioner is requesting is that this Court grant the writ so that a further review of the evidence and evaluation of the facts may be had in the hope that a different result may possibly obtain.

Under such cimcumstances a writ should not issue.

II. The decision below is clearly correct.

Petitioner takes the position that every action brought under the Federal Employers' Liability Act presents a jury question and that no court may invade that jury function. This is clearly not true. While there is no question but that the jury must decide fact questions where there are fact questions created, not all cases have that necessary evidence or fact situation that compels or allows a jury determination.

Milom v. *New York Central Railroad Company*, 248 F 2d 52, Cert. Denied 355 U. S. 953

New York, New Haven and Hartford Railroad Company v. *Henagan*, 364 U. S. 441

Herdman v. *Pennsylvania Railroad Co.*, 352 U. S. 518

Respondent agrees that the scope of judicial inquiry in cases such as this is limited but the standard of care that must be exercised by the employer needs only to be reasonable and the diligence required needs only to be commensurate with the circumstances and the danger to be apprehended.

Petitioner claims that the Court below did not take a fair view of the evidence and apply the rules applicable to the case herein. A reading of the opinion of the Court below shows that the reverse is true.

The record shows that the Petitioner claimed in his own testimony, and through his attorneys, that there was nothing defective about the operating lever, the coupler or any other piece of equipment proximately related to the alleged accident. The record shows that the Petitioner accomplished, with or without lighting, exactly what he intended to accomplish and that his attorneys do not claim that darkness per se was the cause of the injury. The record is devoid of evidence as to how the accident occurred and as to when the locking of plaintiff's knee occurred i.e. before or after the fall. The record shows that the tools and equipment needed by Petitioner were available on the motor car and in the car inspectors' shanty. The record shows that the motor car was in the westbound advance yard and arrived upon the very track he desired it to be on within ten minutes of his summons. The record shows, contrary to Petitioner's claim, that the railroad supervisory personnel testified that it was the function of the motor car to be available, but not to accompany the car inspectors. In fact Petitioner's testimony reveals that the motor car was usually right next to the bunch of cars being inspected, but he did not claim that a motor car accompanied each inspector.

Petitioner is still claiming that the Court of Appeals did not take a fair view of the evidence because the Respondent did not have the motor car "at the scene of Kuberski's accident in keeping with admitted good railroad practice" when the proof is absolutely devoid of any statement or inference that good railroad practice required the motor car to be "at the scene".

Petitioner's statement regarding the amount of the verdict is obviously without the slightest support in the written opinion of the Court of Appeals.

Upon the facts of this case and for the reasons set forth herein Respondent believes that the decision of the Court of Appeals was correct; that the granting of the writ would merely serve as a review of the evidence and specific facts and that the petition should therefore be denied.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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